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No. 1033

In the Supreme Court of the United States

October Term, 1945.

F. A. GILLESPIE, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for Writ of Certiorari, and Brief in Support Thereof

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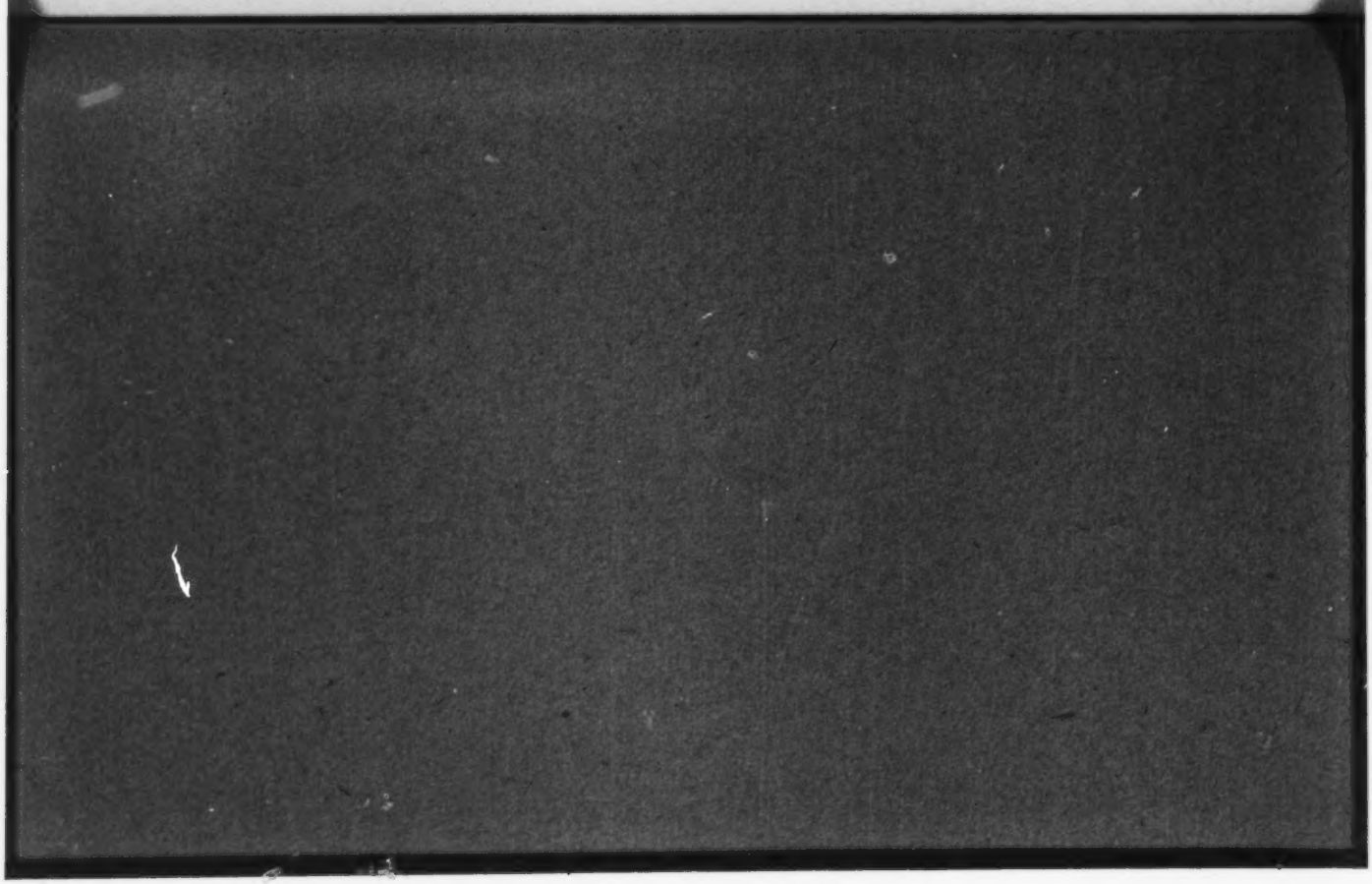

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1945.

No. .....

F. A. GILLESPIE, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above entitled cause on October 29, 1945, affirming the decisions of the Tax Court of the United States (formerly United States Board of Tax Appeals). Petition for rehearing was filed on December 7, 1945, pursuant to an order entered November 23, 1945, extending the time for filing the petition for rehearing to December 8, 1945. The petition for rehearing was denied on January 2, 1946.

Opinion Below.

This case was considered by the Tax Court of the United States (formerly United States Board of Tax Appeals) and by the United States Circuit Court of Appeals for the

Tenth Circuit. The opinion of the Board of Tax Appeals was a memorandum opinion and is unreported but appears at record, page 23.

The opinion of the Circuit Court of Appeals is reported in .... Fed. (2d) ...., and appears in the record at page 141; RICE, District Judge, dissented but filed no dissenting opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 29, 1945, and thereafter, pursuant to an order granting an extension to December 8, 1945, a petition for rehearing was filed on December 7, 1945, and was denied on January 2, 1946. (R. 147-162) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, Title 28, United States Code 347.

Question Presented.

In this proceeding, involving the taxable years 1936, 1937, and 1938, is the taxpayer estopped from consideration by a proceeding previously had involving the taxable year 1934, where a new statute has been enacted covering the later years and when there has been a supervening decision of the Circuit Court settling a point of law contrary to the judgment relied upon as *res judicata* and has thus created a "new situation," rendering it inappropriate to apply the doctrine of collateral estoppel by judgment.

Statutes and Regulations Involved.

The Revenue Act of 1936, applicable to the taxable years 1936 and 1937 and the Revenue Act of 1938, applicable to taxable year 1938, provides for the exclusion of amounts received as an annuity as follows:

REVENUE ACT OF 1936 (49 STAT. 1648):

Section 22(b)(2). "*Annuities, etc.* Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. *Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity* (whether or not paid during such year), until the aggregate amount excluded from gross income under this title prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) of this paragraph." (Italics added.)

REVENUE ACT 1938 (52 STAT. 447):

Section 22(b)(2). "*Annuities, etc.* Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. *Amounts received as an an-*

nuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this title prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph." (Italics added.)

Regulation 94, relating to income tax under the Revenue Act of 1936, promulgated by the United States Treasury Department provides as follows:

Article 22 (b) (2) —2. "*Annuities.* Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. If an annuity is payable in annual installments, there shall be included in gross income only such portion of the amounts received in any taxable year as is equal to 3 per cent of the aggregate premiums or consideration paid for such annuity, whether or not paid during such year. If an annuity is payable in two or more installments over each 12-month period, such portion of each installment shall be taxable as is equal to 3 per cent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the tax-

able year, divided by the number of installments payable during such year. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income * * *."

Regulations 101, relating to income tax under the Revenue Act of 1938, promulgated by the United States Treasury Department provides as follows:

Article 22 (b) (2)—2. "*Annuities.* Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. Such portion of each installment payment of an annuity shall be included in gross income as is not in excess of 3 per cent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by 12 and multiplied by the number of months in respect of which the installment is paid. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income * * *."

Statement.

This case involves income tax deficiencies for the calendar years 1936, 1937 and 1938 of $671.48, $2,415.28, and $1,572.36, respectively (R. 29), resulting from the inclusion in taxpayer's income for each taxable year by the Commissioner of Internal Revenue (R. 5-15) of the entire amount

of a $15,000 payment made under the terms of a contract dated May 15, 1929 (R. 71), upon the theory that the taxpayer acquired an annuity from F. A. Gillespie and Sons Company under the terms of the said contract. The cost of this annuity was claimed to be not less than $732,120.11 and the exclusion of all but 3% of the cost permitted under the Revenue Acts being more than the $15,000.00 received each year, the taxpayer became liable for taxation upon the entire amount received. The taxpayer contended that he should be taxed upon an amount no greater than 3% of what an annuity would have cost him on May 15, 1929, that would have paid him $15,000 per year, for life. The Tax Court and the Circuit Court of Appeals of the Tenth Circuit sustained the Commissioner of Internal Revenue upon the theory that this issue was decided adversely to the taxpayer for the prior taxable year 1934, notwithstanding that a supervening decision of the Circuit Court of Appeals for the Ninth Circuit had decided the issue adversely to the contention of the Commissioner of Internal Revenue.[1]

On April 24, 1920, F. A. Gillespie and Sons Company, a corporation, was organized under the laws of the State of Oklahoma, with capital stock of $1,000,000.00, divided into 10,000 shares of $100 each. The stock of this corporation was held, five shares each in the name of F. A. Gillespie and Maud A. Gillespie, and the three sons of F. A. Gillespie and Maud A. Gillespie, being B. A. Gillespie, L. A. Gillespie and P. A. Gillespie. The remaining 9,975 shares were held in trust by F. A. Gillespie under a trust agreement dated February 9, 1921 (R. 65).

On May 15, 1929, F. A. Gillespie and Maud Gillespie entered into a separation agreement and property settlement (R. 75) and contemporaneously therewith, entered into an agreement with F. A. Gillespie and Sons Company

1. Gillespie v. Commissioner of Internal Revenue, 128 F. (2d) 140.

(R. 71). By the terms of this agreement, F. A. Gillespie and Maud Gillespie agreed to convey to the corporation all of the real and personal property owned by each, with the exception of some personal real estate and $100,000 in cash reserved by each; and in part consideration for the conveyance of this property, the corporation agreed to pay F. A. Gillespie the sum of $15,000 per year, and to Maud A. Gillespie the sum of $15,000; and, in addition, the corporation agreed that Maud A. Gillespie should receive dividends in the amount of at least $10,000 per year, and if funds were not available to be declared as dividends, the corporation agreed to pay Maud A. Gillespie from any source the said additional sum of $10,000.

Thereafter, the terms of the agreement were carried out; and between the years 1929 and 1932, conveyances were executed and delivered carrying out the terms of the agreement (R. 59).

Under the terms of the agreement, F. A. Gillespie and Maud A. Gillespie conveyed to the company the following property of the values indicated which they owned jointly:

United States First Liberty Loan Bonds and Port of New Orleans, La., State Bonds	$1,172,000.00
Empress Building, Tulsa, Oklahoma	150,000.00
Sundry land and lots located in Oklahoma	22,512.00
Cash and Accounts Receivable	94,365.22
Sundry stocks	25,363.00
Total	$1,464,240.22

The cost of the above properties to F. A. Gillespie and Maud A. Gillespie equaled or exceeded the above fair market values (R. 24-43). F. A. Gillespie was the owner of one-half of the above properties delivered to the company under the contract of May 15, 1929, and one-half of the cost of same was his (R. 60-62).

Up to December 31, 1935, F. A. Gillespie had received the sum of $99,375 under the terms of the contract of May 15, 1929. During each of the calendar years 1936, 1937 and 1938, F. A. Gillespie received from F. A. Gillespie and Sons Company the sum of $15,000 under the terms of the contract (R. 60).

Up to December 31, 1935, Maud A. Gillespie received the sum of $97,560.26 under the terms of the contract of May 15, 1929. During the calendar year 1936 Maud A. Gillespie received the sum of $19,000 and during each of the calendar years 1937 and 1938 she received $15,000 (R. 48).

On July 12, 1937, the petitioner filed a petition with the United States Board of Tax Appeals, Docket No. 89442 (R. 83). In said petition the petitioner contested the determination of the Commissioner of Internal Revenue for the taxable year 1934 that he was taxable upon the basis of $40,000 per year ($15,000 per year paid to him under the terms of the agreement and $25,000 guaranteed to be paid to Mrs. Gillespie, R. 87). Said determination of the Commissioner of Internal Revenue was made on the theory that the agreement of May 15, 1929, was a part of the divorce decree; hence the terms of the property settlement constituted alimony and the entire $40,000 was taxable to F. A. Gillespie.

Thereafter the case was tried to the United States Board of Tax Appeals and on September 30, 1938, the findings and opinion of said Board of Tax Appeals was promulgated (R. 95).[2] In the opinion and findings of fact it was determined that the amount received pursuant to the contract of May 15, 1929, by Maud Gillespie during the year 1934 was not to be included in the income of F. A. Gillespie (R. 102). Pursuant to such findings of fact and opinion the court entered its decision on October 28, 1938 (R. 102).

2. The published opinion appears as F. A. Gillespie v. Commissioner, 38 B. T. A. 673.

Thereafter, on March 2, 1939, the Commissioner of Internal Revenue proposed to assess additional income tax against Maud Gillespie for the year 1935 upon the basis that the entire amount received by her during that year under the contract of May 15, 1929, were taxable.

Thereafter, Maud Gillespie contested the Commissioner's determination by lodging an appeal with the United States Board of Tax Appeals and by it decided on the 22nd day of January, 1941, opinion reported at 43 B. T. A. 399.[3]

Thereafter the taxpayer perfected an appeal to the United States Circuit Court for the Ninth Circuit and thereafter that court determined[4] that the taxpayer should have been deemed to have paid for an annuity which the contract of May 15, 1929, granted her, based upon what such an annuity would have cost if purchased from an insurance company on that date; and that on such date Maud Gillespie could have purchased an annuity from an insurance company which would pay her the sum of $15,000 per year, for $196,537.50; the court further held that she should be taxed upon the basis of 3% of such sum, or $5,896.13; and that no more than that amount should be included in her gross income for the taxable year 1935.

Thereafter, on September 28, 1939, the Commissioner of Internal Revenue sent a registered letter directed to F. A. Gillespie in which it was proposed to assert a deficiency of income tax for the taxable year 1936 in the amount of $671.48 (R. 5). On December 13, 1939, the Commissioner sent a registered letter directed to F. A. Gillespie in which it was proposed to assert a deficiency of income tax for the year 1937 in the amount of $2,415.28 and for the year 1938 in the amount of $1,572.36 (R. 15).

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3. The Commissioner of Internal Revenue acquiesced in the decision by the Board of Tax Appeals, 1941-1 C. B. 5.

4. Maud Gillespie v. Commissioner of Internal Revenue, 128 F. (2d) 140, at pages 143-144, decided May 11, 1942.

In the determination of these deficiencies the Commissioner of Internal Revenue claimed the sum of $15,000 paid under the terms of the contract of May 15, 1929, for each of said years to F. A. Gillespie was an annuity payment, the whole of which was taxable under the provisions of Section 22 (b)(2) of the Revenue Acts of 1936 and 1938.

Thereafter, F. A. Gillespie filed petitions with the United States Board of Tax Appeals (now The Tax Court of the United States) appealing from such determinations by the Commissioner of Internal Revenue (R. 1-11).

Thereafter on May 1, 1944, the cases came on for hearing on their merits before Honorable Bolon B. Turner at which time the deposition of F. A. Gillespie was received and oral testimony and documentary testimony submitted on behalf of the taxpayer.

Judge Bolon B. Turner rendered his memorandum opinion October 25, 1944, and the decision was ordered and decided on October 25, 1944 (R. 23-29).

In the memorandum opinion by Judge Bolon B. Turner it was concluded that the petitioner was estopped from consideration of the tax cases for the taxable years 1936, 1937 and 1938, by the judgment in the prior proceeding had for the taxable year 1934. The Tax Court did not pass upon the other issues raised by the petitioner.

Thereafter on January 15, 1945, the petitioner filed a petition to review the decision of The Tax Court of the United States with the United States Circuit Court of Appeals for the Tenth Circuit (R. 32) and thereafter on October 29, 1945, the United States Circuit Court of Appeals for the Tenth Circuit affirmed the decision of The Tax Court of the United States (R. 141).

Thereafter, on the 23rd day of November, 1945, an order was entered giving the petitioner until December 8, 1945, in which to file its petition for rehearing (R. 147).

Thereafter, on the 7th day of December, 1945, the petitioner filed its petition for rehearing (R. 148) which was denied by the United States Circuit Court of Appeals for the Tenth Circuit on January 2, 1946 (R. 162).

Specification of Errors to Be Urged.

The United States Circuit Court for the Tenth Circuit erred:

I.

In affirming the decision of The Tax Court of the United States in finding that the proceedings had in the case of this taxpayer involving the taxable year 1934 was *res judicata* of the proceedings for the taxable years 1936, 1937 and 1938.

II.

In not sustaining the objection of petitioner's counsel to the introduction of the 1934 tax case file of the Board of Tax Appeals; and in not ordering said file excluded from the evidence in this case.

Reasons for Granting the Writ.

1. The decision of the court below is in conflict with *Henrickson* v. *Seward,* 135 F. (2d) 986, decided by the Circuit Court of Appeals for the Ninth Circuit and *Monteith Bros. Co.* v. *United States,* 142 F. (2d) 139, decided by the Circuit Court for the Seventh Circuit and *Pelham Hall Co.* v. *Hassett,* 147 F. (2d) 163, decided by the Circuit Court of the First Circuit and *Commissioner of Internal Revenue* v. *Arundel-Brooks Concrete Corporation,* 152 F. (2d) 225, decided by the Circuit Court of the Fourth Circuit and *Commissioner of Internal Revenue* v. *Security-First National Bank of Los Angeles,* 148 F. (2d) 937, decided by the Circuit Court of the Ninth Circuit and *Commissioner of In-*

ternal Revenue v. *Netcher,* 143 F. (2d) 984, decided by the Circuit Court for the Seventh Circuit, and *Blair* v. *Commissioner of Internal Revenue,* 300 U. S. 5, ... S. Ct. 332, 81 L. ed. 465.

All of these decisions hold that a supervening decision of the highest court[5] settling a point of law contrary to the judgment relied upon as *res judicata* may be considered as having created a "new situation" rendering it inappropriate to apply the doctrine of collateral estoppel by judgment in litigation involving subsequent tax years.

There is no legal distinction between those holdings and the one for which the petitioner asks in this case, to-wit, that the decision by the Board of Tax Appeals in the 1934 case deciding that F. A. Gillespie was taxable only upon the $15,000 received by him, was not *res judicata* of the issue that he was taxable upon the basis of 3% of the cost of an annuity which would produce the sum of $15,000 per annum, which was the issue in the 1936, 1937 and 1938 cases, particularly where there had been an intervening decision by the highest court settling a point of law contrary to the 1934 judgment which was relied upon as *res judicata;* thus rendering it inappropriate to apply the doctrine of collateral estoppel by judgment in litigation involving subsequent tax years.

In refusing to consider the merits of the case of petitioner for the subsequent tax years of 1936-1938 the decision of the court below is in conflict with *Gillespie* v. *Commissioner of Internal Revenue,* decided by the Circuit Court of Appeals for the Ninth Circuit, 128 F. (2d) 140,[6] in which the court stated:

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5. The highest court was considered to be the Circuit Court of Appeals in the Henrickson and Monteith Bros. Co. cases.

6. The court quoted with approval Raymond v. Commissioner of Internal Revenue, (C. C. A. 7th Cir.) 114 F. (2d) 140, certiorari denied 311 U. S. 710, 85 L. ed. 462, 61 S. Ct. 319; in which the court held that

"Petitioner (the taxpayer's executor) contends that the contract was not an annuity contract, but was merely a contract whereby the taxpayer and her husband transferred property to the corporation. Actually, it was a contract whereby the taxpayer and her husband transferred property to the corporation, and in consideration thereof, the corporation agreed (1) to pay each of them $15,000 a year for life and (2) to pay the taxpayer a dividend of $10,000 a year. We think that, in so far as it related to the payments of $15,000 each to the taxpayer and her husband, this was an annuity contract."

2. The decision of the court below is in conflict with *Dow* v. *Humbert,* 91 U. S. 294, 23 L. ed. 368, and *Bank of United States* v. *Beverly,* 42 U. S. 134, 11 L. ed. 75. Those decisions hold that where a plea of *res judicata* is made in the answer it must allege a prior final judgment with certainty and that a general allegation is not sufficient to warrant the admission of evidence of the judgment.

There is no legal distinction between that holding and the one for which the petitioner contends in this case, to-wit, that the plea of *res judicata* set out in the answer of the respondent supported only by the statement that a *former case had been decided between the same parties,* the opinion of which was alleged to be reported at 38 B. T. A. No. 91 was not sufficient to warrant the admission of evidence of the "judgment" or "decision" in the case of *F. A. Gillespie* v. *Commissioner of Internal Revenue,* Docket No. 89442.

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6. (*continued*)

where an annuitant purchased an annuity paying therefor more than the "fair cost" of acquiring a similar annuity from an insurance company that the legal presumption was that the excess over such "insurance company cost" was a gift and the amount to be taken into consideration in computing taxpayer's income tax was only such "fair cost" and not the total value of the gift.

3. The court below has in this case decided an important question of Federal law which is in conflict with the Circuit Court for the First, Fourth, Seventh and Ninth Circuits and in view of the importance of the question of *res judicata* and its application to tax cases the question continues to be an active one and should be authoritatively settled by this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

HAROLD E. RORSCHACH,
JACK L. RORSCHACH,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

To avoid duplication this brief is limited to argument since the formal statements required by the rules of the court appear *ante* as a part of the petition.

I.

The decision below is in conflict with the decisions by the Circuit Courts of the First, Fourth, Seventh and Ninth Circuits and require Mr. Gillespie by virtue of the doctrine of collateral estoppel by judgment *(res judicata)* to be taxed on the basis of $15,000 for all taxable years from the proceeds of his half of the contract while Mrs. Gillespie is exempt on all of the $15,000 paid her, save $5,896.13 in all subsequent years.

In the present case Mr. Gillespie and Mrs. Gillespie entered into a contract on May 15, 1929, by which they delivered certain assets to F. A. Gillespie and Sons Comjany, having a value in excess of $1,400,000.00 in consideration of which the company agreed to pay each of the Gillespies the sum of $15,000 per year so long as they might live.

For the tax year 1934 the Commissioner of Internal Revenue asserted the $25,000 payment received by Mrs. Gillespie and the $15,000 payment received by Mr. Gillespie were to be taxed to him. Upon a trial of the case for the year 1934 the Tax Court determined that Mr. Gillespie was to be taxed upon the basis of the $15,000 payment which he received and Mrs. Gillespie was to be taxed upon the basis of the $25,000 payment which she received. Later Mrs. Gillespie contested this principle for the taxable year 1935 and the Circuit Court for the Ninth Circuit[7] determined that she was to be taxed upon the basis of 3% of the cost

7. Gillespie v. Commissioner, 128 F. (2d) 140, at pages 143-144.

of an annuity which would pay her the sum of $15,000 per year for her life ($196,537.50). Thereafter, for the tax years 1936, 1937 and 1938, the Commissioner of Internal Revenue asserted a claim, against Mr. Gillespie, upon the theory that the entire $15,000 payment was taxable to him for those years by reason of the previous decision concerning the taxable year 1934.

Different revenue acts were then in effect[8] and a different state of fact then existed. The Tax Court in deciding Mr. Gillespie's case for the years 1936, 1937, and 1938 determined that the previous case presented for the year 1934 estopped him from asserting a different basis for taxation than had been determined in the 1934 case. It is obvious that such a decision was erroneous; the Circuit Court of Appeals for the Ninth Circuit having in the meantime decided a case in favor of Mrs. Gillespie* on the question of the taxation of the entire amount $15,000 paid to her and determined that only a part of the same should be taxed. After describing the contract of May 15, 1929, and the property paid in to F. A. Gillespie and Sons Company by Mr. and Mrs. Gillespie, the court stated:

> "Petitioner (the taxpayer's executor) contends that the contract was not an annuity contract, but was merely a contract whereby the taxpayer and her husband transferred property to the corporation. Actually, it was a contract whereby the taxpayer and her husband transferred property to the corporation and, in consideration thereof, the corporation agreed (1) to pay each of them $15,000 a year for life and (2) to pay the taxpayer a dividend of $10,000 a year. We think

8. The Revenue Act of 1934 was controlling in the previous case whereas the Revenue Acts of 1936 and 1938 are controlling in the present case. The Internal Revenue Code was not enacted until February 10, 1939; prior to that date all Federal income taxes were imposed under the provisions of separately enacted revenue acts.

*Gillespie v. Commissioner, 128 F. (2d) 140, at pages 143-144.

that, in so far as it related to the payments of $15,000 each to the taxpayer and her husband this was an annuity contract.

* * * * * * * *

"At the time of the contract the taxpayer could have purchased an annuity from an insurance company for $13,102.50 per thousand dollars. Thus she could have purchased an annuity of $10,000 a year for $131,025; $15,000 a year for $196,537.50; $25,000 a year for $327,562.50. We conclude that the consideration paid for the annuity of $15,000 a year which the contract granted the taxpayer—the only annuity here involved — was $196,537.50. It follows that, of the $17,666.23 which the taxpayer received from the corporation in 1935, $5,896.13 (3% of $196,537.50) and no more, should have been included in the taxpayer's gross income for 1935. Section 22(b)(2), *supra.* * * *."

The facts in Mr. Gillespie's present case are on all-fours with the facts in the *Henrickson* v. *Seward* case[9] and in the *Monteith Bros. Co.* case[10] and the *Pelham Hall Co.* case.[11] The only difference in these cases and the *Gillespie* case is that in the present *Gillespie* case estoppel by judgment has been construed against the taxpayer and in favor of the government whereas in the *Henrickson* and *Monteith Bros. Co.* cases the taxpayer was seeking to invoke "estoppel by judgment" against the government. Can it be that the doctrine of *res judicata* in tax cases is a rule which discriminates in favor of the government and against the taxpayer? It has always been the general rule of law that in case of doubt all taxing statutes were to be resolved in *favor of the taxpayer* and *not against the taxpayer.*

In the *Henrickson* and *Monteith Bros.* cases the taxpayer had established its non-liability for taxes in the Dis-

9. Henrickson v. Seward, (C. C. A. 9th Cir.) 135 F. (2d) 986.

10. Monteith Bros. Co. v. United States, (C. C. A. 7th Cir.) 142 F. ed. 139.

11. Pelham Hall Co. v. Hassett, (C. C A. 1st Cir.) 147 F. (2d) 63.

trict Court involving *certain periods but under the provisions of the same revenue act.* Later suits involving the same principles and the *same revenue act* between other taxpayers went to the Circuit Court of Appeals and were decided adversely to the taxpayers and which were adverse to the previous District Court judgments in the *Henrickson* and *Monteith Bros.* cases, which had then become final. The Commissioner of Internal Revenue later sought to impose a tax for a different period, but *under the same revenue act* against the taxpayers in the *Henrickson* and *Monteith Bros.* cases and was met by the plea of *res judicata* citing the previous District Court judgments in their favor of non-tax liability. In both cases the District Court sustained the taxpayer in his plea.

Upon appeal both Circuit Courts reversed the District Court upon the theory that these situations were an exception to the general accepted rule of estoppel by judgment. The court in the *Pelham Hall Co.* case stated the rule to be:

> "A supervening decision of the highest court* settling a point of law contrary to the judgment relied upon as *res judicata,* may perhaps be considered as having 'created a new situation' (*Blair* v. *Commissioner of Internal Revenue, supra,* 300 U. S. 5, at page 9, 57 S. Ct. 332, 81 L. ed. 465) rendering it inappropriate to apply the doctrine of collateral estoppel by judgment in litigation involving subsequent tax years. For example, suppose in an action by A, a manufacturer of jigsaw puzzles, the District Court decides that jigsaw puzzles are 'games' within the meaning of Section 609 of the Revenue Act of 1932, 47 Stat. 264, 26 U. S. C. A., Int. Rev. Acts, page 612, imposing a 10% excise tax on the sale of sporting goods and games. No appeal is taken. Later, in litigation brought by a competing manufacturer, the Supreme Court decides that jigsaw puzzles are not 'games' within the meaning of the particu-

*The highest court was considered to be the Circuit Court of Appeals in the Henrickson and Monteith Bros. cases.

lar section of the Revenue Act. *White* v. *Aronson*, 1937, 302 U. S. 16, 58 S. Ct. 95, 82 L. ed. 20. Is A, in all subsequent sales by him of jigsaw puzzles, to be saddled with the tax because of *res judicata*, whereas his competitors are free of the tax?"

Certainly it cannot be seriously urged that Maud Gillespie, who owned one-half of the assets and who was a party to, and the beneficiary of, one-half of the contract dated May 15, 1929, is to be taxed upon an entirely different basis than F. A. Gillespie who owned the other one-half of the assets transferred and who was a party to, and the beneficiary of, the other one-half interest in the contract of May 15, 1929. The Circuit Court for the Ninth Circuit has decided the manner in which Maud Gillespie shall be taxed[12] and stated that F. A. Gillespie participated likewise in the contract. This is the "supervening decision" of the highest court settling a point of law contrary to the judgment relied upon as *res judicata* and thus must be considered as having "created a new situation."

When no facts can be pointed to which are sufficient to distinguish Tax Court (Board of Tax Appeals) decisions in legal effect, except that different judges of The Tax Court have decided differently in two cases, the Court of Appeals and the Supreme Court are bound by both law and duty to exercise a sound discretion in review to resolve the conflict.[13]

II.

The objection of petitioner's counsel to the introduction of file in case Docket No. 89442, Board of Tax Appeals, should have been sustained and said file should have been excluded from the evidence in this case.

The Commissioner of Internal Revenue set up an affirm-

12. Maud Gillespie v. Commissioner, 128 F. (2d) 140, at page 143.

13. F. A. Gillespie, 38 B. T. A. 673; Maud Gillespie v. Commissioner, 43 B. T. A. 399, aff'd 128 F. (2d) 140; Anna L. Raymond, 40 B. T. A. 244, aff'd 114 F. (2d) 140.

ative defense to taxpayer's petition (R. 8-21, par. 7). He attempted to plead *res judicata* (estoppel by judgment) by reference to a published opinion, in a case filed with the Board of Tax Appeals, by a member thereof, referring to the *opinion* by volume and number. (38 B. T. A. No. 91, R. 8-21, par. 7.) He did not plead the decision (R. 102) neither was anything attached to the answer as an exhibit, nor was any reference made which would apprise the taxpayer of what "decision" or "judgment" he should take notice.

At the time of trial over the objection of the counsel for taxpayer, the respondent was permitted to introduce into the record all of the proceedings had in case Docket No. 89442 (R. 54). Counsel for taxpayer also moved to strike the exhibit from the record which was denied by the court (R. 54-55).

The court should have sustained the objection of the petitioner's counsel and excluded the file in case Docket No. 89442, as no exhibit of the "judgment" or "decision" upon which the respondent appears to rely was attached to the answer which would have apprised the petitioner of the "judgment" or "decision" upon which the respondent would rely as an "estoppel by judgment."

The judgment or decree of a court is that which binds the litigant and not the opinion of the court. "Opinion" and "decision" are not equivalent terms; the court's "decision" of a case being its judgment thereon, and its "opinion" being a statement of the reasons on which the judgment rests.[14]

The law[15] provides and the courts recognize that the

14. Rogers v. Hill, 289 U. S. 582, 77 L. ed. 1285; Amick & Co. v. Springfield Grocery Co., 7 F. (2d) 855; Judson v. Gage, 98 Fed. 540; cf. Judicial Code, pars. 128 and 238, U. S. C., Title 28, pars. 225, 345.

15. I. R. C., Section 1142.

terms "decision" and "opinion" of The Tax Court are not synonymous terms. An appeal to the Circuit Court of Appeals may be taken only from a "decision."[16]

The plea of *res judicata* set out in the answer of the respondent (and which was denied by petitioner, R. 10-22) supported only by the statement that a former case had been decided[17] between the same parties reported at 38 B. T. A. No. 91,[18] is not sufficient to warrant the admission of evidence of the judgment ("decision") of *F. A. Gillespie* v. *Commissioner of Internal Revenue*, Docket No. 89442.[19]

In the *Dow* v. *Humbert* case[19] the court decided that a general allegation that a prior judgment concluded the matter between the parties did not warrant the admission of a specific judgment at the time of trial. The court stating:

> "In support of the issue as to the existence of the first judgment, plaintiffs introduced a copy of a record of a judgment between the same parties for the same amount, and of the same date as that described in the declaration, in the Circuit Court for the Eastern District of Wisconsin; to which defendants objected, because it varied from the judgment described in the declaration, and in the notice given to defendants to place it on the tax-list. The court sustained the objection, and this ruling is the ground of the first assignment of errors. The argument of counsel on this branch of the case rests mainly on the ground of the sufficiency of the notice to the Supervisors. But the question before that is, whether such a judgment was admissible under the pleadings as they stood. There had been for

16. Commissioner v. Realty Operators, Inc., 118 F. (2d) 286; Industrial Addition Ass'n v. Comm., 141 F. (2d) 636, reversed on other grounds, 323 U. S. 310, 89 L. ed. 273, 65 S. Ct. 289.

17. No proof was offered to show that the "case" was reduced to a final "judgment" or "decision."

18. Your Honors will note that the pleading did not so much as report the opinion correctly; it appears in Vol. 38 B. T. A. at page 673.

19. Dow v. Humbert, 91 U. S. 294 (1 Otto 294), 23 L. ed. 368, at page 370.

many years a Circuit Court for the District of Wisconsin. Shortly before this judgment was rendered the district was divided into two districts, and the circuit courts were, by the express language of the Act of Congress, called the Circuit Court for the Eastern District and the Circuit Court for the Western District respectively. There was no such court in existence at the date of the judgment offered as the Circuit Court for the District of Wisconsin, and the defendants were justified in pleading *nul tiel* record to a declaration founded on a judgment of that date in that court; and, on this issue as it stood when the record of a judgment in the Circuit Court for the Eastern District was offered, it did not prove a judgment in the Circuit Court for the District of Wisconsin.

"If plaintiff had asked leave to amend his declaration by inserting the word 'eastern' before 'district' in his first count, in describing his judgment, it would no doubt have been granted; and the question would then have arisen as to the sufficiency of notice to the Supervisors, the notice containing the same mistake; but, on the plea of *nul tiel* record of a judgment of the Circuit Court for the District of Wisconsin, it is clear a judgment of the Circuit Court for the Eastern District of Wisconsin is not evidence of such a judgment."

III.

There is a conflict between the Circuit Courts on the question involved and it is of such importance that a writ of certiorari should be granted.

The decision by the court below is in conflict with decisions of the Circuit Courts for the First, Fourth, Seventh and Ninth Circuits and is in conflict with the decided case of Maud Gillespie, the wife of petitioner and the owner of the remaining one-half interest in the contract of May 15, 1929. It is proposed to tax the petitioner upon a different basis than was determined, by the Circuit Court for the Ninth Circuit, to be the proper basis for the wife, Maud

Gillespie, the owner of the other one-half interest in the contract of May 15, 1929.

When no facts can be pointed to which are sufficient to distinguish Tax Court decisions in legal effect, except that different judges of The Tax Court have decided differently in two cases, the Supreme Court is bound by both law and duty to exercise a sound discretion in review to resolve the conflict.

In view of the importance of the question of *res judicata*, and its application to tax cases, the question continues to be an active one, and should be authoritatively settled by this Court.

It is, therefore, respectfully submitted that the petition should be granted.

For all of which your petitioner will ever pray, etc.

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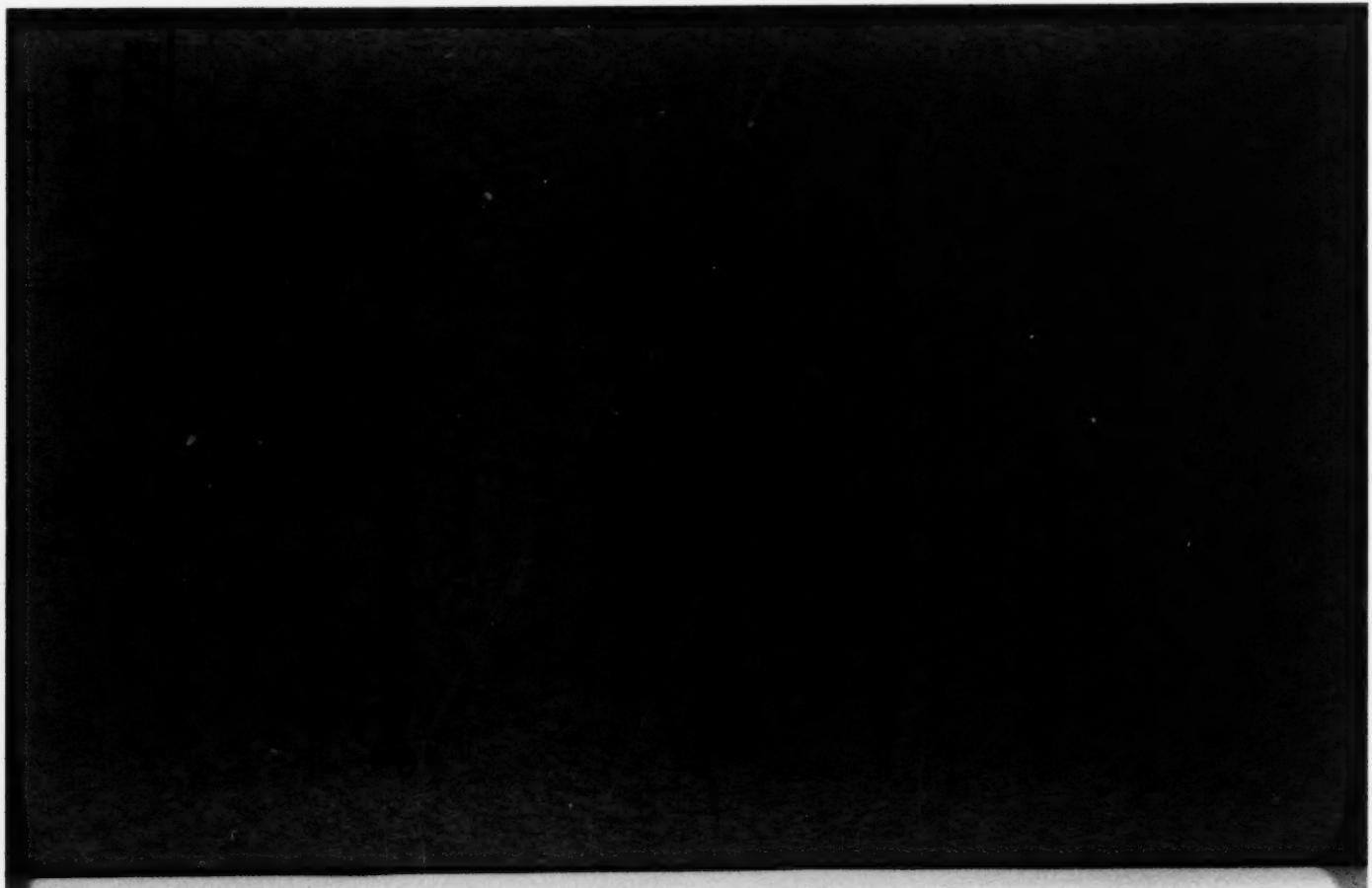
March 25, 1946.



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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1033

F. A. GILLESPIE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court (R. 23–28) are not reported. The opinion of the Circuit Court of Appeals (R. 141–147) is reported at 151 F. 2d 903.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 29, 1945. (R. 147.) An order was entered extending the time for filing a petition for rehearing to December 8, 1945 (R. 147), and a petition for rehearing (R. 148–160) filed December 4, 1945, was denied on Janu-

ary 2, 1946 (R. 162). The petition for a writ of certiorari was filed on March 30, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the taxability of annuity payments received by petitioner in the years 1936–1938 is conclusively determined, under the principle of *res judicata,* by the prior decision in *Gillespie* v. *Commissioner,* 38 B. T. A. 673, holding that payments under the identical annuity contract in 1934 were taxable under Section 22 (b) (2) of the Revenue Act of 1934.

2. Whether the Tax Court committed reversible error by receiving in evidence the former proceedings in which the same basic question had already been litigated.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the statutes and regulations involved are set forth in the Appendix, *infra.*

STATEMENT

The Tax Court found the facts as follows (R. 23–27):

The taxpayer is an individual, and his place of business is in Tulsa, Oklahoma. He and Maud Gillespie were husband and wife, having been married in 1892. The taxpayer's date of birth

was April 22, 1868, and that of Maud Gillespie, June 9, 1872. Neither the taxpayer nor Maud Gillespie owned any property at the date of their marriage, and neither inherited any property during their marriage. During the period of their married life, however, they did acquire and accumulate a rather substantial amount of property. (R. 23.)

At some time prior to May 15, 1929, Maud Gillespie instituted court proceedings against the taxpayer for the division of their property and for maintenance, but not for divorce and alimony. On that date she and the taxpayer entered into a written agreement settling all property rights between them. It was stated that the property, both real and personal, then owned by them having been acquired since marriage, was community property. Provision was then made that each party should have $100,000 in cash as his or her separate property, and after designating that certain specified pieces or parcels should be the separate property of one or the other, the agreement further provided that the parties would, under a contract to be entered into with F. A. Gillespie & Sons Company, an Oklahoma corporation, transfer all of their remaining property to that corporation in consideration for certain payments to be made by that corporation to each of them so long as each should live. In keeping with the agreement between them the taxpayer

and Maud Gillespie, also on May 15, 1929, entered into a contract with F. A. Gillespie & Sons Company, whereunder that corporation, in consideration of the transfer to it by the taxpayer and Maud Gillespie of certain property, more specifically set forth hereafter, agreed to pay to the taxpayer $15,000 a year during his life, and to pay to Maud Gillespie $15,000 a year during her life, and $10,000 a year, also during her life, out of dividends, or, if not from dividends, to pay $10,000 a year to her for life, in any event. (R. 24.) The property conveyed to F. A. Gillespie & Sons Company by the taxpayer and Maud Gillespie pursuant to the contract above, at its fair market value on May 15, 1929, was as follows (R. 24):

United States First Liberty Loan Bonds and Port of New Orleans, Louisiana, state bonds	$1,172,000.00
Empress Building—Tulsa, Oklahoma	150,000.00
Sundry lands and lots located in Oklahoma	22,512.00
Cash and accounts receivable	94,365.22
Sundry stocks	25,363.00
Fair market value of all property so transferred	$1,464,240.22

The cost of the above property to the taxpayer and Maud Gillespie equaled or exceeded the above-stated fair market value. (R. 25.)

An annuity could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a male individual born in the United States on April 22, 1862, the date on which the taxpayer was born, which would have paid $15,000 per

annum to such male individual, for his life, for the sum of $153,750. An annuity could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a female individual born in the United States on June 9, 1872, the date of the birth of Maud Gillespie, which would have paid the sum of $15,000 per annum to such female individual, for her life, for the sum of $196,537.50. (R. 25.)

Previously, on February 9, 1921, the taxpayer had executed a written declaration of trust declaring that he stood seized and possessed as trustee of 9,975 shares of the 10,000 shares of capital stock of F. A. Gillespie & Sons Company, for himself, Maud Gillespie and their three sons, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, the interest of each being 1,995 shares. The trust was to continue so long as any one of the five mentioned persons should live. The instrument contained provisions for remaindermen of the interest of each of the named beneficiaries and provided that upon the death of all of the beneficiaries the corpus of the trust should pass to the remaindermen then living, or if there were no remaindermen, to the heirs at law. The interests of the taxpayer and Maud Gillespie were to go to their three sons or the issue thereof. The taxpayer, as settlor, donor and trustee reserved to himself during his lifetime, broad powers of management and control over the corpus of the trust.

Neither Maud Gillespie nor any of the three sons had any power to sell, convey or otherwise dispose of or encumber their interests in the trust. (R. 25.)

Under date of April 19, 1937, the Commissioner of Internal Revenue notified the taxpayer of his determination of a deficiency in income tax against him for the year 1934. It was disclosed that part of the deficiency resulted from the inclusion as taxable income of the $15,000 received by him in 1934 from F. A. Gillespie & Sons Company, under the contract above set forth, that that amount was an annuity, and was taxable to him under the provisions of Section 22 (b) of the Revenue Act of 1934. (R. 25–26.) By petition and amended petition filed with the Tax Court (then the United States Board of Tax Appeals), the taxpayer alleged that the inclusion of the $15,000 as taxable income was erroneous, in words as follows (R. 26):

> (a) The Commissioner of Internal Revenue erred in including in taxpayer's gross income the sum of $15,000 received from F. A. Gillespie & Sons Company during the year 1934.
>
> * * * * *
>
> (c) In the alternative, if the Honorable Board determines that any part of the sum of $15,000 received by F. A. Gillespie from F. A. Gillespie & Sons Company during the year 1934 is taxable, then only such portion of the $15,000 is taxable as represents 3% of what an annuity would have cost at

May 15, 1929, as would have produced the sum of $15,000 per annum during the lifetime of F. A. Gillespie.

The Commissioner, by answer and amended answer, denied error and the proceeding went to trial on the issues as set forth. Under date of September 30, 1938, the Board of Tax Appeals promulgated its findings of fact and opinion, wherein it was held that the entire $15,000 received by the taxpayer in the year 1934, under the above contract of May 15, 1929, with F. A. Gillespie & Sons Company, was taxable income to him, under the provisions of Section 22 (b) (2) of the Revenue Act of 1934. The points considered by the Board in reaching that conclusion were whether or not the $15,000 so received by the taxpayer was taxable to him under Section 22 (b) (2) of the Revenue Act of 1934 "as received under an annuity, or exempt from taxation because constituting only a return of corpus"; whether in applying Section 22 (b), the three per cent limitation prescribed therein was applicable to the full amount of the consideration paid by the taxpayer to F. A. Gillespie & Sons Company, under the contract of May 15, 1929, or only "some amount reasonably necessary to purchase the annuity in question"; and whether Section 22 (b) (2) was unconstitutional. The conclusions of the Board were adverse to the contentions of the taxpayer on each of the points considered, and it was held

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that the entire $15,000 was taxable to the taxpayer. (R. 26–27.)

In determining the deficiencies herein, the Commissioner has similarly included as taxable income to the taxpayer in each of the years 1936, 1937 and 1938 the entire $15,000 received by him in each of those years, under the above contract with F. A. Gillespie & Sons Company. The taxpayer in his petition filed with the Tax Court under Docket No. 100401, involving his 1936 income tax liability, alleges that the action taken by the Commissioner with respect to the $15,000 was in error, as follows (R. 27):

> (a) The Commissioner * * * erred in including in taxpayer's gross income the sum of $15,000.00 received from F. A. Gillespie & Sons Company during the year 1936.
>
> (b) The Commissioner * * * erred in considering as annuity income the sum of $15,000.00 received from F. A. Gillespie & Sons Company during the year 1936.
>
> (c) In the alternative, if the * * * Board determines that any part of the sum of $15,000.00 received by F. A. Gillespie from F. A. Gillespie & Sons Company during the year 1936 is taxable, then only such portion of $15,000.00 is taxable as represents 3% of what an annuity would have cost at May 15, 1929, as would have produced the sum of $15,000.00 per annum during the lifetime of F. A. Gillespie.

Except that the petition filed under Docket No. 101234 covers the years 1937 and 1938, and except for some typographical discrepancies, the allegations of error are identical with those covering the 1936 liability quoted above. The Commissioner, in his amended answers, denied that in determining the deficiencies herein against the taxpayer, he erred, as alleged by the taxpayer in his petitions. (R. 27.) He further alleged that the 1934 decision was *res judicata*. (R. 21, 22.)

The Tax Court held (R. 28) that the taxpayer was estopped by the judgment in the earlier case from disputing the inclusion of the entire amount of the annuity payments in his gross income, and accordingly, sustained the determinations by the Commissioner. The Circuit Court of Appeals, Judge Rice dissenting, affirmed the decision of the Tax Court, holding that the taxpayer was estopped by the former judgment from raising the same issues again and denying the taxpayer's assertions that the Tax Court erroneously admitted the former proceedings in evidence. (R. 141–147.)

ARGUMENT

In 1929, the taxpayer transferred certain property to F. A. Gillespie & Sons Company, a family corporation, in return for which the corporation undertook to pay him $15,000 a year for life. Under Section 22 (b) (2) (see Appendix, *infra*, p. 15), payments received under an annuity con-

tract constitute gross income up to an amount equal to 3 per cent of the aggregate consideration paid for the annuity. Proceedings involving the taxpayer's income tax liability for 1934 resulted in a final decision of the Board of Tax Appeals (38 B. T. A. 673), holding that the consideration paid by the taxpayer for the annuity was the value of the property transferred by him and that the entire $15,000 received by him was includible in his taxable income under Section 22 (b) (2) of the Revenue Act of 1934, c. 277, 48 Stat. 680.

1. The court below held that the amount of the consideration paid by the taxpayer for the annuity in question had already been established by the previous litigation between the parties and that, absent any change in the applicable law, the prior final judgment prevented the taxpayer from litigating anew the same issues with respect to the taxable years here involved. The decision of the Circuit Court of Appeals is manifestly correct in holding that the taxpayer may not attempt to contradict at this time the basic facts which were determined in the prior proceedings. *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620; *United States* v. *Moser*, 266 U. S. 236.

2. There are no direct conflicts in decisions. *Gillespie* v. *Commissioner*, 128 F. 2d 140 (C. C. A. 9th), reversing 43 B. T. A. 399 (Pet. 12–13, Br. 16–17, 19) (which involved a similar annuity payable to the taxpayer's wife) did not announce a

new rule of law or apply Section 22 (b) in any different manner from that employed in the present case or in the previous litigation instituted by this taxpayer. The case involving Mrs. Gillespie was based on a separate record which established different facts and warranted the conclusion that she intended to make a gift, or a capital contribution, to the family corporation in the amount by which the value of the property transferred by her exceeded the price that it would have cost for the purchase of a similar annuity from a reputable life insurance company. Since, in the previous litigation involving this taxpayer, he did not establish that a similar gift had been made by him, the application of the identical statutory provisions to different factual situations resulted in different tax liabilities. This, however, does not create a conflict between decisions which are actually in harmony.

In addition, the decision below respecting the binding nature of the former adjudication on the identical issues raised does not conflict with the decisions of this Court. *Blair* v. *Commissioner,* 300 U. S. 5 (Pet. 12), involved an intervening decision of a state court on a controlling question of state law, a matter which this Court determined must be given effect in the proper exercise of federal jurisdiction. That case has no application here. Nor is there a conflict between the decision below and those of other circuits. *Henricksen* v. *Seward,* 135 F. 2d 986 (C. C. A. 9th), and

Monteith Bros. Co. v. *United States,* 142 F. 2d 139 (C. C. A. 7th) (Pet. 11–12, Br. 17–18), were concerned with operative facts which, although similar, were different at least in the respect that they took place in different tax years; here, the relitigation is concerned with one basic fact situation that had already occurred before the prior proceedings and which had been placed in issue in the former litigation. In addition, those cases involved an intervening authoritative decision establishing a different rule of law from that applied with respect to the former tax liabilities. This, it was held, prevented the application of *res judicata.* Similar rulings were made in *Commissioner* v. *Arundel-Brooks Concrete Corp.,* 152 F. 2d 225 (C. C. A. 4th); *Commissioner* v. *Security-First Nat. Bank,* 148 F. 2d 937 (C. C. A. 9th); and *Pelham Hall Co.* v. *Hassett,* 147 F. 2d 63 (C. C. A. 1st) (Pet. 11–12, Br. 17–18). As we have shown, in the present case there was no change in the applicable rule, either by statute or by decision. The cases relied on by the taxpayer are, therefore, clearly not in point.

While *Commissioner* v. *Netcher,* 143 F. 2d 484 (C. C. A. 7th), certiorari denied, 323 U. S. 759 (Pet. 11–12), is also distinguishable in that different statutory provisions and regulations were in effect at the time of the second proceeding, to the extent that the opinion rules that *res judicata* is not to be applied merely because different tax

years are involved, it is clearly out of line with *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620.

3. The taxpayer's technical objections to the manner of pleading and proving the former adjudication of the Board of Tax Appeals (Pet. 13, Br. 19–22) are plainly without foundation. Contrary to the assertions made (Br. 20), the Commissioner's answers did refer to a "decision" of the Board which "has since become final" (R. 8, 21–22). It may be noted that the taxpayer's reply admitted that such a case had been decided, but denied that it involved the same questions and asserted that it did not constitute *res judicata*. (R. 10–11, 22–23.) We believe that the Board's decision was adequately pleaded and proved (cf. Rule 9 (e), Federal Rules of Civil Procedure) and that the court below was correct in so holding. (R. 147.)

Even if there were any merit in the arguments advanced by the taxpayer, it is clear that they come too late. Since the objections made to the introduction in evidence of the former proceedings were couched in general terms, no reference being made to the supposed defects now alluded to (R. 53–55), and since the matter could have been easily remedied if a proper, specific objection had been made (cf. Rule 15 (a) and (b), Federal Rules of Civil Procedure), the taxpayer is precluded from asserting error before an ap-

pellate court. *Noonan* v. *Caledonia Mining Co.*, 121 U. S. 393; *Choctaw, Oklahoma & R. R. Co.* v. *McDade,* 191 U. S. 64; *District of Columbia* v. *Woodbury,* 136 U. S. 450.

CONCLUSION

The decision below is correct. No question of importance is presented and there are no conflicts in decisions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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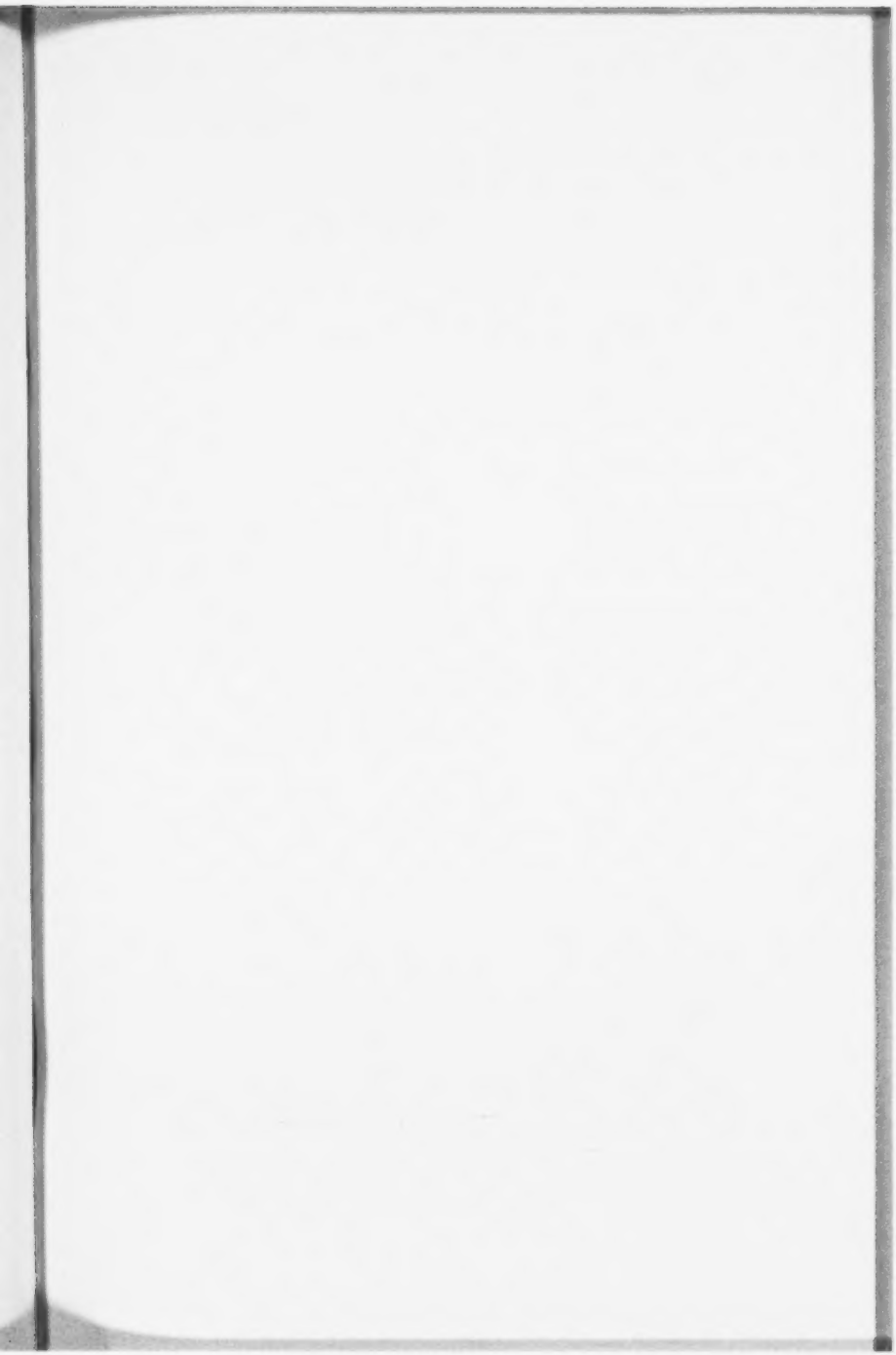
APRIL 1946.



APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.* * * *

(2) *Annuities,* etc.—* * * Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this title or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *

* * * * *

The corresponding provisions of Section 22 (b) (2) of the Revenue Act of 1938, c. 289, 52 Stat. 447 are identical.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 22 (b) (2)–2. *Annuities.*—Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semiannually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which install-

ments are payable or may be payable over a period longer than one year. If an annuity is payable in annual installments, there shall be included in gross income only such portion of the amounts received in any taxable year as is equal to 3 percent of the aggregate premiums or consideration paid for such annuity, whether or not paid during such year. If an annuity is payable in two or more installments over each 12-month period, such portion of each installment shall be taxable as is equal to 3 percent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by the number of installments payable during such year. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income. * * *

* * * * *

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 22 (b) (2)–2. *Annuities.*—Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semiannually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. Such portion of each installment payment of an annuity shall be included

in gross income as is not in excess of 3 percent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by 12 and multiplied by the number of months in respect of which the installment is paid. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income. * * *

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No. 1033

In the Supreme Court of the United States

October Term, 1945.

F. A. GILLESPIE, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION for REHEARING.

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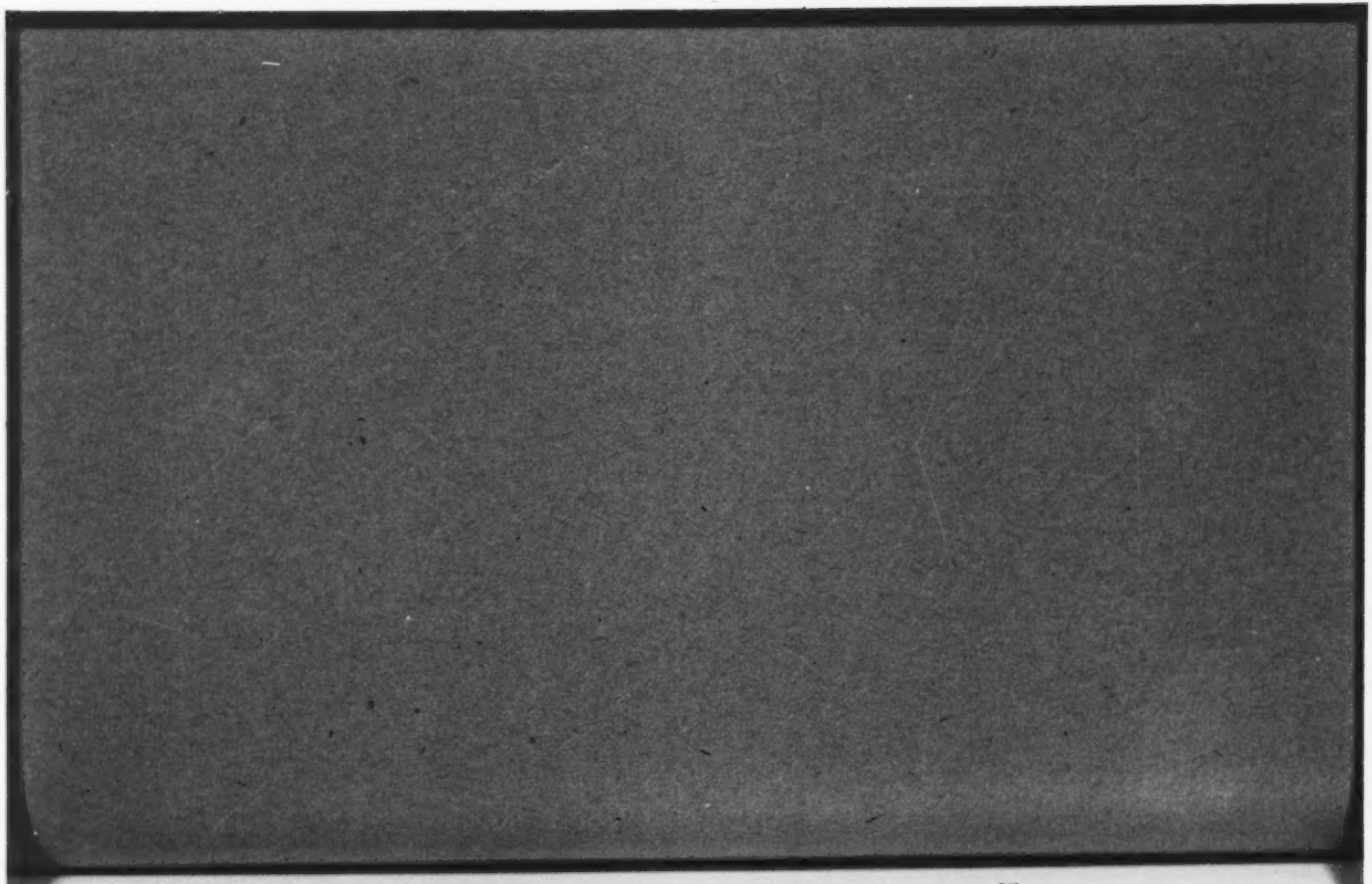

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1945.

No. 1033

F. A. GILLESPIE, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION *for* REHEARING.

To the Honorable Supreme Court of the United States and the Judges Thereof:

Comes now, F. A. Gillespie, petitioner in the above entitled case and presents this, his petition for rehearing, on his application for petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit, and in support thereof respectfully shows that:

The court erred in its conclusion that the petition for the writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit should be denied in the following manner, to-wit:

Petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit was filed in the Supreme Court of the United States, October term 1945, on the 30th day of March, 1946, and thereafter on the 6th day of May, 1946, the Supreme Court of the United

States denied the petitioner's petition for said writ of *certiorari.*

The court erred in denying the said application of the petitioner for writ of *certiorari* for the following reasons:

I.

The decision of the court below is in conflict with *Henricksen* v. *Seward,* 135 F. (2d) 986, decided by the Circuit Court of Appeals for the Ninth Circuit, and *Montieth Bros. Co.* v. *United States,* 142 F. (2d) 193, decided by the Circuit Court of Appeals for the Seventh Circuit, and *Pelham Hall Co.* v. *Hassett,* 147 F. (2d) 63, decided by the Circuit of Court of Appeals for the First Circuit, and *Commissioner of Internal Revenue* v. *Arundel-Brooks Concrete Corp.,* 152 F. (2d) 225, decided by the Circuit Court of Appeals for the Fourth Circuit, and *Commissioner of Internal Revenue* v. *Security-First National Bank of Los Angeles, California,* 148 Fed. 937, decided by the Circuit Court of Appeals for the Ninth Circuit, and *Commissioner of Internal Revenue Revenue* v. *Netcher,* 143 F. (2d) 484, decided by the Circuit Court of Appeals for the Seventh Circuit.

II.

The court below in this case had decided an important question of Federal Income Tax Law which is in conflict with the several Circuit Courts of Appeal and more particularly the First, Fourth, Seventh and Ninth Circuits, and in view of the importance of the question of *res judicata* and its application to income tax cases decided by The Tax Court the question should be authoritatively settled by this Court.

Wherefore, petitioner respectfully prays that this Court grant a rehearing upon petitioner's petition for writ

of *certiorari* and upon a rehearing enter an order granting the petition for writ of *certiorari;* in support of which a brief is filed concurrently herewith.

For all of which your petitioner will ever pray, etc.

HAROLD E. RORSCHACH,
1046 Kennedy Building,
Tulsa 3, Oklahoma,

JACK L. RORSCHACH,
Vinita, Oklahoma,
Attorneys for Appellant.

Tulsa, Oklahoma,
May 31st, 1946.

CERTIFICATE OF COUNSEL.

The undersigned, record counsel for the appellant herein, does hereby certify and declare that the petition for rehearing filed in the proceeding in the instant cases is filed in good faith and not for any purpose of delay or injustice.

(SIGNED) HAROLD E. RORSCHACH

....,
HAROLD E. RORSCHACH,
Attorney for Appellant.